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Supreme Court Decisions

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CRIMINAL LAW—RECEIVING STOLEN GOODS—EVIDENCE OF POSSESSION—*Kidd vs. The People*—No. 14024—*Decided October 5, 1936*—*Opinion by Mr. Justice Burke.*

Kidd was convicted of receiving stolen property and sentenced.

1. Evidence was properly excluded that at the time and place when defendant's person and property were searched, the property was not found.

2. Possession of stolen goods is not an essential element of proof of receiving.

3. Here the people did not prove or claim possession, but did claim and offer evidence that a part of the goods had been sold and the remainder stored elsewhere. Hence, the rejected testimony was immaterial.—*Judgment affirmed.*

DEEDS—NECESSITY OF DELIVERY—*Monroe, et al. vs. Monroe*—No. 13794—*Decided December 7, 1936*—*Opinion by Mr. Justice Young.*

Monroe, plaintiff below, had a judgment canceling a deed from his father, since deceased, to his children not including the plaintiff. The court below canceled the deed on the ground that there had been no delivery by the grantor prior to his death.

1. The case below was tried to the court. The court below found on conflicting evidence that the deed had not been delivered by the grantor to the grantee prior to the death of the grantor. The testimony clearly presented an issue of fact which the court, who heard the witnesses, resolved in favor of the plaintiff.

2. We are bound by the fact findings of the trial court based on conflicting evidence, which are supported by the record.—*Judgment affirmed.*

Mr. Chief Justice Campbell not participating—Mr. Justice Holland dissenting.

ACCOUNT—GUARANTY—SUFFICIENCY OF COMPLAINT—*The Rio Grande Fuel Company vs. Colorado Central Power Company*—No. 13768—*Decided December 7, 1936*—*Opinion by Mr. Justice Holland.*

The Colorado Central Power Company recovered judgment against The Rio Grande Fuel Company for $699.80 for electrical energy furnished. Suit was brought below both against The Rio Grande Fuel Company and Bluebird Mines, Inc., but the latter de-

faulted and default judgment was entered against it. The theory of the complaint and the evidence was that it furnished electrical power for the operation of the Bluebird mine in Jefferson County during a part of 1932 and that the operations of the mine not being successful that The Rio Grande Fuel Company agreed to purchase the output of the mine and that The Rio Grande Fuel Company did advance and pay part of the expenses of operation of the Bluebird mine. There was no evidence that The Rio Grande Fuel Company originally assumed or agreed to pay the bill or that it originally contracted the account.

1. Where the complaint is framed upon an original liability and not upon a liability as a guarantor, such complaint is an admission that no original liability existed and that the suit was not predicated on a guaranty.

2. The allegations of the complaint being insufficient to state a cause of action on guaranty the plaintiff cannot shift from his original pleaded action on original contract.

3. The evidence was insufficient to show that there was any original liability on the part of The Rio Grande Fuel Company to pay the power bill.—*Judgment reversed.*

GAMBLING—SLOT MACHINES—INJUNCTION AGAINST CITY TO RESTRAIN FROM INTERFERING WITH SLOT MACHINES—*Walker et al. vs. Begole as Mayor et al.*—No. 13677—*Decided December 14, 1936—Opinion by Mr. Justice Burke.*

Walker and Shulman brought injunction to restrain the city of Denver from destroying or seizing their slot machines, which they alleged they installed in amusement places in Denver, the proceeds of which were to be divided between themselves and the lessees or proprietors. These machines were known as "pin-ball" machines. The machines were operated by placing a coin in them, which released the balls, which were then propelled by a plunger, and the balls falling into different slots determined what, if anything, it would pay. Writ of injunction was denied upon the sustaining of a demurrer to the complaint.

1. A demurrer does not admit legal conclusions in a complaint.

2. Where an implement is used or kept for the purpose of gambling it is immaterial that the machine pays nothing to the player.

3. Injunction will not be granted to stay criminal or quasi-criminal proceedings.

4. Injunction will not be issued to prevent a multiplicity of suits where the purpose is to prevent a criminal action against the defendant based on the number of different criminal violations. Such a defendant may not try all these questions in one injunction suit merely to prevent multiplicity of suits.

5. The demurrer was properly sustained and the judgment is affirmed.

MEDICINE — CHIROPRACTIC — PRACTICING WITHOUT A LICENSE — WHAT CONSTITUTES PRACTICING—*Hurley vs. The People*—No. 13752—*Decided December 24, 1936—Opinion by Mr. Justice Hilliard.*

Hurley was charged in one count of an information with unlawfully practicing medicine without a license and in a second count with unlawfully practicing chiropractic without a license and was convicted on both counts. The evidence disclosed that he was not treating any patients nor diagnosing any cases but was conducting a school of healing and giving lectures for pay to students and teaching a theory that disease was caused by the body being out of equilibrium, and if restored and adjusted to the center of gravity and kept so, that physical ills would largely disappear.

1. It does not appear that anything taught by defendant is within legislative inhibition or inimical to public health, safety, morals or general welfare.

2. To visit criminal prosecutions because of it would not only encroach upon defendant's right to engage in a lawful activity, but upon the rights of those who wish to pursue the course of study.

3. The power of the judicial branch cannot be fitly invoked under the circumstances here.

4. There was nothing in the record to indicate that defendant was either engaged in the practice of medicine or chiropractic.

5. The schools of medicine and chiropractic being entirely different, it is inconceivable that defendant could be found guilty of a violation of both on the same evidence. His acts must have been in contravention of one or the other or of neither, but assuredly not of both. Hence the verdicts were repugnant and inconsistent. Each negatived the other. No form of verdict will be good which creates repugnancy or absurdity in the conviction.—*Judgment reversed.*

SCHOOL DISTRICTS—LIABILITY OF OFFICERS FOR LOSS ON SCHOOL BONDS—*Lemon vs. Giradot*—No. 13814—*Decided December 31, 1936—Opinion by Mr. Justice Holland.*

Lemon, a taxpayer, was allowed to intervene in a suit brought by School District No. 2 of Elbert County and two of its directors against three former directors of the district for an accounting and judgment for $15,000, upon the theory that the former directors had caused refunding bonds to be issued to take up a former bond issue and had delivered the refunding bonds to the United States Bond Company for negotiation and that the bonding company had gone out of business and become bankrupt before the proceedings were completed, and of the refunding bonds, had disposed to innocent purchasers bonds of the value of $15,000 without accounting to the district for any part of the proceeds, so that the school district was saddled with this additional debt and the suit was on the theory that the directors were negligent and as trustees were bound to account for the loss.

1. Even if it be said that the school board exercised poor judgment in its selection of a bond broker and in the dealings that followed, there is no claim that the board was not using its best judgment and acting in good faith. Involuntary public officials are absolved from errors in judgment and the results thereof.

2. The members of a school board are not liable individually for the improvident but good-faith actions of the board when they lend their time and sincere efforts for a public purpose without compensation.

3. Even if the board members are considered as trustees, their relationship to the public is not changed. It was no less a governmental function. The duty, whether a trust duty or otherwise, is still a public, governmental duty to be performed within the discretion of the board, in good faith, as an agency of the state, and when so acting, it did so in a purely political or sovereign capacity.—*Judgment of dismissal affirmed.*

Mr. Justice Burke specially concurring.

Mr. Justice Hilliard, Mr. Justice Bouck and Mr. Justice Young not participating.

MUNICIPAL CORPORATOINS—WARRANTS—DEBTS—CONSTITUTIONAL LAW—PRESUMPTIONS—TOWN WARRANT FOR SERVICES RENDERED OUTSIDE TOWN—*Georgetown vs. Bank of Idaho Springs*—No. 13639—*District Court of Clear Creek County, Hon. Samuel W. Johnson, Judge—On Rehearing—Affirmed.*

FACTS: Action by bank as holder of a number of warrants issued by the town to recover a judgment against the town of Georgetown. The warrants were validly incurred by the town unless the board of selectmen and officers had the power to incur the indebtedness and issue warrants therefor.

HELD: 1. The board and officers had the power to incur the indebtedness and issue the warrants therefor.

2. A municipality chartered by the Colorado Territory may elect to become subject to the general laws passed under section 13, C. L. 1921, p. 2365, sections 9254 et seq.

3. Where a town fails to exercise the privilege of becoming subject to the laws (and Georgetown so failed), its original charter is the sole measure of its powers, rights and liabilities, except in so far as that charter has been amended or is in conflict with the Constitution.

4. The Colorado Constitution does not forbid a town receiving its charter from Colorado Territory, and which fails to exercise the privilege of coming under the general laws passed under section 13 (supra), from paying its warrants in the order of their registration, regardless of the calendar or fiscal year.

5. The provision of section 8, article 11, of the State Constitution, which provides that no town shall contract "any debt by loan in any form," except by means of an ordinance, etc., does not include indebtedness incurred by the town for expenses and evidenced by warrants.

6. The burden is on the town to overcome the presumption and evidence of regularity of a warrant.

7. A warrant will not be condemned as invalid where it merely appears that it was issued to an officer of the town for services rendered outside the town as well as for services within.

8. An issue not within the pleadings and upon which there is no assignment of error will not be considered.

The original opinion, which read for reversal, was withdrawn, and the opinion herein is substituted therefor.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Campbell and Mr. Justice Holland dissent.

ACTION TO RECOVER TAX ILLEGALLY AND ERRONEOUSLY LAID; COUNTY COMMISSIONERS—TAXATION—PROCEDURE—PLEADING—*Lowden et al. vs. Board of County Commissioners*—No. 14073—*Decided June 21, 1937*—*District Court of Lincoln County*—*Hon. Arthur Cornforth, Judge*—*Reversed.*

FACTS: Plaintiffs as trustee of a railroad owning property in Lincoln County brought suit against County Commissioners to recover taxes paid under protest which were allegedly illegally and erroneously laid. The demurrers to the complaint were sustained by the lower court on the ground that the plaintiffs did not plead that they had resorted to "administrative remedies provided by the statutes * * * for the correction, abatement or refunding of such alleged erroneous and illegal tax," and that, therefore, they were not entitled to invoke the power of the judicial branch of the government.

HELD: 1. Where a taxpayer, while protesting, pays a tax, a portion of which is contended to have been illegally and erroneously assessed by having the item for teachers' salaries so loaded that the levy, made pursuant to the certification of a budget by the school board for a special levy to raise the funds, resulted in an unconscionable and illegal burden on the taxpayers, he has the right to invoke the power of the courts to obtain a refund. And this is so although the plaintiff does not allege that he has resorted to "administrative remedies provided by the statute," for the objection raised is not one provided for by such statutes, and, therefore, there is no opportunity for seeking administrative remedy.

2. Where there is alleged an abuse of discretion on the part of the school authorities, but where the procedure, in making the levy, otherwise was within the law and the statutes, the complaint is good, as against demurrer, without the allegation of resort to administrative remedy before suit.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke and Mr. Justice Bakke concur.

WILLS—CONSTRUCTION—LAPSED BEQUEST—INTENT—*Bacon et al. vs. Kitely, etc., et al.*—No. 14015—*Decided June 21, 1937—County Court of Denver—Hon. George A. Luxford, Judge—Reversed.*

HELD: 1. In interpreting wills, the intention of the testator governs.

2. The intent, if possible, must be determined from the will itself and effectuated by the courts. If doubt exists, resort may be had to certain recognized principles and rules of construction.

3. A legacy, generally, lapses by the death of the legatee, in testator's lifetime, if no successor be named.

4. In the case of a bequest to discharge a debt, the rule changes, and the legacy does not lapse, because the thing in the testator's mind is the debt, not the person; and if the debt had been paid in legatee's lifetime, it would have passed to his estate, and the testator's intent would have thus been effectuated.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

PLEADING — STATUTE OF LIMITATIONS — RECORD ON COUNTY TREASURER'S CALL OF SCHOOL WARRANTS—COUNTY TREASURERS—SCHOOL DISTRICTS—*Schoolfield vs. School District*—No. 14092—*Decided June 21, 1937—District Court of Custer County—Hon. James L. Cooper, Judge—Affirmed.*

HELD: 1. Since the right to plead the statute of limitations, as given by statute, is special and personal, it is presumed waived unless specially pleaded. The reason is prevention of surprise.

2. If the essential facts appear upon the face of the pleading, the statute may be raised by demurrer; otherwise by answer stating such facts, that the adversary may be advised.

3. Such facts as are presumably within the special knowledge of the adversary, or depend upon his evidence and cannot be admitted by the pleader without prejudice, would not come within the reason, and hence, not within the rule. In such event, the pleader may make plain his intent to rely upon the statute and await the evidence which demonstrates its applicability.

4. Where plaintiff sues on warrants drawn on the general fund of the school district, and the defendant pleads the statute of limitations in the following words:

> "That the cause of action therein stated is barred by the statute of limitations of the State of Colorado for the reason that this action was not commenced within six years next after said cause of action accrued,"

the plea is good.

5. No statute requires the treasurer to keep a record of his calls of school warrants, and where a record was kept, but so negligently as to

be no evidence that no call was made, it will not be of use to the holder of the warrants for there is a general presumption that officials do their duty.

6. County Treasurers are not officers of school districts.

7. Sec. 8801, C. L. 1921, makes it a duty of the County Treasurer, on certain conditions to pay warrants. This section, when complied with, stops the interest on the warrants, and is for the protection of the district, and was not intended to confer a privilege or an advantage upon warrant holders.

8. Where the facts show that there was more than sufficient funds to pay these warrants in the treasury much more than six years preceding the bringing of the suits the statute pleaded is applicable and the suit is barred.

Opinion by Mr. Chief Justice Burke, Mr. Justice Knous and Mr. Justice Holland concur.

STATUTE OF LIMITATIONS—TRUSTS—ESTOPPEL—INSURANCE—*Indemnity Insurance Company of North America vs. Almina Smith* —No. 14001—*Decided June 28, 1937—District Court of Weld County—Hon. Claude C. Coffin, Judge—Judgment affirmed.*

FACTS: Action to recover securities deposited by plaintiff in connection with the formation of the X Insurance Company. Statute required furnishing bond to the insurance commissioner for a return of money paid upon stock subscriptions in the event the organization of the company was not perfected. Defendant issued its bond for such purpose. The X Insurance Company obtained a subscription for stock from plaintiff. For the purchase price thereof, she deposited the securities in question, under an agreement that she might return the stock issued and receive back her securities. The X Insurance Company turned said securities over to the defendant as collateral for the issuance of its bond, and informed the defendant of all the facts. Trial court ordered securities returned to plaintiff.

HELD: 1. This is an action based on a trust and not grounded on fraud. Therefore, the five-year statute of limitations applies and not the three-year statute.

2. The defendant insurance company, having been informed of the contract by which the plaintiff could demand the return of her securities, is not a holder in due course, but a constructive trustee.

3. The plaintiff's failure to institute suit earlier did not injuriously affect defendant or change its position to its prejudice.

Opinion by Mr. Justice Holland. Mr. Justice Burke and Mr. Justice Knous concur.

CONTRACTS—PARENT AND CHILD—RESCISSION—*Caldwell vs. Mullin*—No. 14013—*Decided June 28, 1937—District Court of Denver—Hon. Frank McDonough, Sr., Judge—Affirmed.*

FACTS: Action to rescind contract for support and to compel reconveyance. Plaintiff conveyed all of his property to his daughter, the defendant, who was his only living child, and would be his sole heir. In consideration for this conveyance, it was agreed that the daughter would support plaintiff during his life and upon his request reconvey the property to him. Defendant refused to reconvey.

HELD: The trial court's judgment that the property should be reconveyed to plaintiff is justified. The judgment rests on the trial court's finding of facts, and will not be disturbed.

Opinion by Mr. Justice Bakke. Concurred in by Mr. Justice Hilliard and Mr. Justice Knous.

WORKMEN'S COMPENSATION—PREJUDICIAL ERROR—TESTIMONY—EXPERTS—EVIDENCE—DEATH CERTIFICATES—*Elleman et al. vs. Industrial Commission of Colorado et al.*—No. 14100—*Decided March 1, 1937—District Court of El Paso County—Hon. John M. Meikle, Judge—Affirmed.*

FACTS: The husband of the plaintiff in error worked for a plumbing and heating company as a truck driver. February, 1936, he made a trip to Yuma, Arizona, and returned with a slight cold and quite fatigued. He rested on the following day, and returned to work on February 4, 1936, when, accompanied by three fellow employees, they fought a blizzard and finally managed to reach the Edison school where they were to install a boiler. There was no heat in the building; it was bitterly cold, and the deceased's job was to cut a hole through an 18-inch concrete wall at a point directly above his head. While doing so he inhaled more or less dust which arose from the cutting of the concrete. He returned home all worn out, was not able to work subsequently and died February 14, 1936, of bronchial pneumonia. Plaintiff in error contends that there was no evidence upon which the commission and the lower court could base their judgment that the inhalation of the cement dust was not the proximate cause of death.

HELD: 1. That a death certificate certified by a doctor stating that the principal cause of death was bronchial pneumonia is prima facie evidence in all courts and places of the facts therein stated.

2. That it is not prejudicial error to ask a medical expert whether death was the result of an accident based upon his examination of the death certificate alone. That such testimony is at least corroborative testimony.

3. That there being sufficient competent evidence to support the findings, that there was no accident or injury arising out of the employment, the judgment will not be disturbed.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

STATUTES—MARRIAGE—COMMON LAW—HEIRS—NATURAL AND ILLEGITIMATE CHILDREN—ANNULMENT—*Valdez, as Guardian of Rebecca Shaw, a minor, vs. Wilbur Shaw et al.*—No. 13887—*Decided March 1, 1937—District Court of Rio Grande County—Hon. M. T. Hancock, Judge.*

FACTS: Case arises out of proceedings in determination of heirship in re estate of Byron Shaw. Rebecca Shaw is the natural child of the deceased, who lived with the mother of plaintiff in error, but who never married her. At the time when they were living together, in such a relationship that would have constituted a common law marriage, the mother of the plaintiff in error was still married to Antonio Vigil. The question arises whether the natural but illegitimate children of a deceased shall inherit.

HELD: 1. Section 5151, C. L. 1921, provides in effect that the mother being deceased, the property of the father shall descend "To his children surviving." But Section 5158, C. L. 1921, provides: "Illegitimate children shall inherit the same as those born in wedlock, *if the parents subsequently intermarry,* etc." Reading these two sections together, it clearly appears that the surviving children to which reference is made in section 5151 means those born in wedlock.

2. That as to plaintiff in error's contention that under Chapter 127, Section 6, Session Laws of 1933, a child born of a void marriage is legitimate, the said Section 6 refers only to cases where an annulment proceeding is brought and that no such proceeding was here involved.

Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Bouck concur.

CONSTITUTIONAL LAW—TAXATION—CONSTRUCTION OF TERMS—PUBLIC SCHOOLS—POWER OF LEGISLATURE TO TAX FOR PUBLIC SCHOOLS—MUNICIPAL CORPORATIONS—SCHOOL DISTRICT—*Wilmore, etc. vs. Annear, etc., et al.*—No. 13902—*Decided March 1, 1937—District Court of Denver—Honorable Charles C. Sackmann, Judge—Affirmed.*

FACTS: Plaintiff as taxpayer, for himself and others similarly situated, sought to enjoin the State Auditor and Treasurer from issuing and paying warrants disbursing to the various school districts of the state on the basis of daily average attendance per capita certain moneys appropriated for that purpose from the general funds of the state under authority of Chapter 76, S. L. 1935.

HELD: 1. The Colorado State Constitution does not prohibit the legislature from making appropriations from the general revenues of the state for public schools.

2. A word repeatedly used in a constitution will generally be given the same meaning throughout the instrument, whether such meaning is technical or popular in its character.

3. The power to appropriate for the purpose set forth in an Act does not exist without the power to tax for the same purpose. "The

power to do either implies the power to do the other; the lack of power to do either implies a lack of power to do the other."

4. The fact that such an appropriation never before has been made nor appeared as a part of the general appropriation bill for public schools does not tend to prove or disprove the existence of the power to include such as a part of the bill.

5. Non-existent constitutional power cannot be acquired by legislative assertion; existent power is not lost by failure, for however long a time, to exercise it.

6. Financial maintenance of the public schools of the state is a state purpose and not a local or municipal purpose, and it is immaterial that subordinate agencies of the government also may contribute to it.

7. A school district is not a municipal corporation within the meaning of Section 7, Article 10 of the Constitution prohibiting the general assembly from imposing taxes for the purposes of any "County, City, town or other Municipal Corporation."

Opinion by Mr. Justice Young. Mr. Justice Holland dissents. Mr. Justice Knous not participating.

WORKMEN'S COMPENSATION—COURSE OF EMPLOYMENT—COMMON CARRIER, CONTRACT CARRIER—INTERSTATE COMMERCE—INTENT OF THE PARTIES—*Qelle vs. The Industrial Commission of Colorado and Claude ????*.....—No. 14093—*Decided March 1, 1937—District Court of Denver—Hon. Charles C. Sackmann, Judge—Affirmed.*

FACTS: A proceeding under the Workmen's Compensation Act. The commission awarded compensation and its award was favorably adjudged by the trial court. Plaintiff in error having a Wyoming license and Colorado permit to that end, but not having a federal permit, operated a number of trucks between Denver and points in Wyoming by means of which he served a published list of customers by contract but did not serve the general public. He employed claimant, on a weekly wage basis, to drive one of the trucks, and preparatory to claimant's first trip, new tires were purchased for the truck he was to drive, and in the course of their installation by the tire agency, the employer and claimant assisting therein, one of the tires exploded and injured claimant.

HELD: 1. That the fact that both the claimant and his employer were aiding in the tire installation is consistent with the view that they regarded it as within the course of the employment.

2. That plaintiff in error was a "contract carrier" and not a "common carrier" engaged in interstate commerce so as to be exempt under the Compensation Act.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke and Mr. Justice Bakke concur.

WATER RIGHTS—DECREES—APPROPRIATION—PAROL TESTIMONY—CONFLICTING EVIDENCE—*Nicoloff vs. The Bloom Land and Cattle Company*—No. 13784—*Decided March 1, 1937*—*District Court of Las Animas County*—*Hon. A. C. McChesney, Judge.*

FACTS: The Bloom Company, defendant in error, brought suit to restrain Nicoloff, the plaintiff in error, from interfering with water which the company alleged it and its predecessors in title had already appropriated. The waters in controversy consist principally of seepage. The company owned a ranch and a ditch, the ditch running approximately parallel to the Las Animas River. Under a 1903 decree the company owned a priority to water in the river. The land above the ditch had a southeasterly dip toward the river, and considerable flood and seepage came down this slope and had been for decades captured by the company and its grantors in the ditch and had been duly appropriated for irrigation. The company claimed these flood and seepage waters in addition to its decreed water rights. Nicoloff, in 1934, dug a ditch farther up the slope and intercepted the waters, carrying them off to certain fish ponds.

HELD: 1. That a decree as to specific water rights cannot be altered by parol testimony.

2. That such a decree does not curtail the right of the landowner to make further appropriations as needed, and any such further appropriation is not defeated by the fact that it has not yet been, and may never be, protected by a decree.

3. The evidence being in substantial conflict on all the material issues of fact, the District Court's determination of these in favor of the company is binding upon the Supreme Court, and requires the affirmation of the judgment rendered.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

WORKMEN'S COMPENSATION — AWARDS — REHEARING—ERROR—EVIDENCE OF CHANGED CONDITIONS—*Allen et al. vs. Gadbois and the Industrial Commission of Colorado*—No. 14098—*Decided March 8, 1937*—*District Court of Denver*—*Hon. Frank McDonough, Sr., Judge*—*Reversed.*

FACTS: This is a workmen's compensation case and reference is made to plaintiffs in error as plaintiffs, and the defendants in error as claimant and the commission respectively. Claimant suffered a conceded compensable injury March 5, 1932. Claim was made for compensation, liability was admitted and an award was entered June 1, 1933. Claimant petitioned for review in August, 1934, and November, 1935; hearings were had and in May, 1936, the commission again entered a supplemental award, finding claimant had not established any change in condition, error or mistake. On claimant's petition for rehearing on June 11, 1936, and without a hearing or evidence, the commission,

August 14, 1936, entered an award giving him additional compensation, and this award was affirmed by the District Court. The question is, did the court err in failing to hold that the findings made by the commission did not support the award?

HELD: 1. "That reasons for findings are mandatory and apply to errors as well as changed conditions and mere change of mind with no statement of sufficient reasons therefor is no compliance with the law."

2. "That on prior reviews it improperly weighed the evidence," would be a sufficient statement by the commission to grant a rehearing and to change the award, if there was a sufficient statement of reasons for the change. But to change the award there must be additional hearings, and evidence of changed conditions.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

RAPE—ELECTION—EVIDENCE—DISCRETION OF COURT—LEADING QUESTIONS—PREJUDICE—DATE OF ACT—*Wills vs. State of Colorado*—No. 14105—*Decided March 8, 1937—District Court of Mineral County—Hon. John B. O'Rourke, Judge—Affirmed.*

FACTS: Plaintiff in error, hereinafter referred to as the defendant, was convicted of statutory rape and sentenced to a term of from nine to fifteen years in the penitentiary. Defendant admitted having slept with the sixteen-year-old girl on a few occasions, but denies ever having carnally known her.

HELD: 1. The district attorney's election to rely on an offense in a bunkhouse on or about March 26, 1935, before the defense began its case, was not error. The time when an election should be made is within the discretion of the court.

2. That the court may permit the asking of leading questions concerning the perpetration of the act, when the act is relied upon for conviction, and the circumstances necessitate it.

3. That the court counteracts any prejudice that might be caused by conduct of bystanders, by promptly taking steps to suppress the improper conduct, and by directing the jury not to give it any attention, but to decide the case according to the evidence.

4. No definite date for the commitment of the alleged act is required; it is sufficient if the approximate date is established.

5. Facetious remarks by the district attorney about the defense counsel are not approved of by the court, but they are not prejudicial to the defendant.

Opinion by Mr. Justice Bakke.

DECLARATORY JUDGMENT—CONSPIRACY—ERROR—SUFFICIENCY OF FACTS—TOWNS—GOVERNMENTAL AGENCY—*Lueras et al. vs. Town of Lafayette et al.*—No. 13828—*Decided March 8, 1937—District Court of Boulder County—Hon. Claude C. Coffin, Judge—Affirmed.*

FACTS: A proceeding under the declaratory judgment act. Plaintiffs in error, of Spanish descent, citizens of the United States and residents of Lafayette, charged that the town and a governmental activity, the fire department, had conspired and had denied the plaintiffs in error "their right to the use of a certain public swimming pool of the town of Lafayette." The fire department is voluntary and not under the control of the town, and leased the incompleted pool from the city. They put a sign up reading: "Firemen's Pool. We reserve the right to reject any or all persons without cause. White trade only. Lafayette Fire Dept."

HELD: 1. That the lease of the pool was not made in furtherance of a scheme and conspiracy to prevent its use by petitioners.

2. That the showing on the part of the plaintiffs in error was indefinite and uncertain.

3. That the declarations sought by plaintiffs in error are things obviously obtaining, and to declare "that a statute is a statute," "or that a Spanish-American is a Spanish-American," tends to solve no problem involved here.

Opinion by Mr. Justice Hilliard. Mr. Chief Justice Burke and Mr. Justice Bakke concur.

CONTEMPT OF COURT—EVIDENCE—DISCRIMINATION—JURISDICTION—CITY OFFICIALS—*State of Colorado et al. vs. Lowry and Fogg*—No. 13811—*Decided March 15, 1937—District Court of Denver—Hon. George F. Dunklee, Judge—Affirmed.*

FACTS: Action to review certain contempt proceedings had in the District Court, which was a part of the original proceeding based upon a petition for a peremptory writ of mandamus brought by certain negroes to compel Lowry, Manager of Improvements and Parks, and Fogg, Commissioner of Supplies, to comply with the Civil Rights Statutes and therefore not discriminate against the negroes as to days when they could or could not swim at places of public accommodation. The writ was issued and subsequently an advertisement appeared in the Denver Post designating which days negroes were to swim at the Curtis Park pool. It was not known who was responsible for the placing of the advertisement nor who paid for it. Citations of contempt were issued out of the District Court against said Lowry and Fogg, and the court found they were not in contempt.

HELD: 1. In reviewing contempt proceedings, the Supreme Court is confined to the determination of whether the trial court had jurisdiction and regularly pursued its authority; and there was no ques-

tion but what the court had jurisdiction and no doubt but what it regularly pursued its authority.

2. There is sufficient evidence to indicate that the lower court was entirely justified in finding that at the time these alleged discriminations were taking place Lowry and Fogg knew nothing about it.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

MOTION TO VACATE—DISCRETION OF COURT—RIGHTS OF EXECUTORS—PRESERVATION OF THE ESTATE—EVIDENCE—*The London Option Gold Mining Company vs. Dempsy and McDonald*—No. 13930—*Decided March 15, 1937—District Court of Park County—Hon. James L. Cooper, Judge—Affirmed.*

FACTS: The parties will be herein designated as they appeared in the trial court, i. e., defendants in error as plaintiffs, and plaintiff in error as defendant. Plaintiffs are executors of the estate of Albert J. Dempsy, deceased, who was the owner of a certain mining property, and did execute a lease which, with his consent, was assigned to defendant. Executors entered into an agreement with the defendant as to the property, providing that if defendant did not operate the property as provided for, the agreement under which it had possession would be terminated at the option of the estate. Defendant breached and plaintiff filed their complaint in the District Court. The defendant not entering an appearance, judgment was given to the plaintiff. Subsequently, the defendant moved the court that the judgment and decree be vacated. No grounds were stated as a basis of the motion, but it was supported by eight affidavits, and the court ordered the judgment be vacated. A supplemental complaint was filed, trial had, and decree and judgment was entered for plaintiffs. The only specific error assigned by plaintiff in error is that the court erred in denying admission in evidence of nine documents which it offered.

HELD: 1. A motion to vacate must be filed during the term in which the judgment was entered.

2. The "motion to vacate" rests in the sound discretion of the court, and unless such discretion was abused, its action thereon will not be disturbed.

3. If, to preserve the estate, the executors executed the agreement, then they had the right to enforce it for the benefit of the estate.

4. The documents not admitted into evidence were made prior to the above mentioned agreement and are therefore immaterial as affecting the rights of the executors, or the title of the estate to the property involved.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

JUSTICE COURT—COUNTY COURT—FIXING OF, REVIVAL OF ISSUES —REPLEVIN—DAMAGES—*Summers vs. Mock*—No. 14087—*Decided March 15, 1937—County Court of Montrose County—Hon. Earl J. Herman, Judge—Reversed.*

HELD: 1. That an appeal lies from the Justice Court to the County Court, and that the trial de novo can be only upon the issue presented in the Justice Court.

2. The plaintiff in a replevin suit in the Justice Court fixing the issue upon the question of damages based on the value of the property sought to be replevined, and not upon the question of possession, is limited to the same issue in the County Court and cannot revive the question as to possession.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

JUDGMENTS, VOID AND VOIDABLE—MANDAMUS—TAX LEVY—SCHOOL DISTRICT—DAY IN COURT—STATE—JURISDICTION—EQUITY—*Atchison, Topeka and Santa Fe Railway Co. vs. School District No. 2 of Fremont County and Hyde*—No. 13890—*Decided March 15, 1937—District Court of Pueblo County—Hon. John H. Voorhees, Judge—Affirmed.*

FACTS: Hyde instituted an action in the District Court of Pueblo County and obtained judgment by consent of defendant against School District No. 2 of Fremont County. The judgment was in mandamus ordering a levy to pay the money judgment, and the issuance and delivery to Hyde of funding bonds. Thereafter, certain taxpayers, plaintiffs in error here, filed a petition asking for the vacating of the judgment and that they be allowed to appear and defend the suit. Plaintiffs in error alleged that the judgment and mandamus for a levy were obtained fraudulently and constitute a fraud upon the taxpayers.

Hyde contends that inasmuch as the bonds were transferred to the State of Colorado, no action can be taken on the petition until the state has consented to become a party and entered its appearance in the proceedings.

HELD: 1. A judgment by a court having jurisdiction, where said judgment is obtained through fraud or collusion, is voidable only, not void, and hence not subject to collateral attack as: the railway company suing for the return of taxes paid under the herebefore mentioned levy.

2. The state having paid full value for the bonds, it has a vested interest in the judgments such that it cannot be deprived of it in a proceeding to which it is not a party and also because the maintenance of the judgment is essential to the preservation of any rights of the state.

3. Equity looks to substance rather than form and rights cannot be destroyed unless and until the one who possesses them has had his day in court.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke dissents. Mr. Justice Bouck specially concurring.

CONSPIRACY—LARCENY BY BAILEE—EMBEZZLEMENT—STATUTES—CRIME—BAILMENT—SPECIFIC INTENT—INDICTMENT—PREJUDICE—SUPREME COURT PRACTICE—ADMISSION OF EVIDENCE—COLLATERAL FACTS—INTENT AND PURPOSE—*Helser and O'Hanlon vs. State of Colorado*—No. 13789—*Decided March 15, 1937*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: The indictment returned against the plaintiffs in error contained three counts intended respectively to charge the defendants, now plaintiffs in error, with conspiracies to commit: (1) Grand larceny, (2) larceny by bailee, and (3) embezzlement. Upon trial, Helser and O'Hanlon were found not guilty on the first count; were both found guilty on the second count, and Helser guilty and O'Hanlon not guilty on the third count. Plaintiffs in error admit that the conspiracy is sufficiently alleged in both counts but contend that the object of the conspiracy in each instance is not shown by the indictment to be any crime known to either the common law or the statute and that these counts are fatally defective in not alleging every element necessary to constitute the objective felony as fully as if the indictment was for the perpetration of the offenses of larceny by bailee and embezzlement.

HELD: 1. It is unnecessary to charge the object of the conspiracy in the precise words of the statute; so long as the allegations of a conspiracy indictment show that the object of the conspiracy is a crime defined by statute it is sufficient.

2. The allegation in the indictment that the defendants, now the plaintiffs in error, were president, vice-president, etc., at the time they were charged to have converted the money of the company to their own use, as definitely charges a bailment as though it was averred in express terms.

3. The indictment definitely averred a felonious taking and carrying away as the object of the conspiracy, and this sufficiently implies an intent on the part of the takers to steal without an allegation of the specific intent.

4. A criminal indictment charging that a person "embezzled" money has the same effect as if the word "embezzlement," the statutory name of the crime, had been included in the charge.

5. If the indictment charges the intended crime by its statutory name, there is no need of alleging the statutory ingredients of the crime.

6. The Supreme Court has consistently refused to reverse criminal proceedings for technical defects in the information or indictment which do not tend to prejudice the substantial rights of defendants on the merits.

7. In conspiracy cases an unusual latitude must be permitted in the admission of evidence.

8. "Where the guilt of a party depends on the intent, purpose, or design with which an act is done, or on his guilty knowledge thereof, collateral facts in which he bore a principal part may be examined into

for the purpose of establishing such guilty intent, design, purpose, or knowledge. It is sufficient that such collateral facts have some connection with each other as a part of the same plan or as induced by the same motive, and it is immaterial that they show the commission of other crimes."

Opinion by Mr. Justice Knous. Mr. Justice Hilliard and Mr. Justice Holland dissent.

WORKMEN'S COMPENSATION — CIRCUMSTANTIAL EVIDENCE — ADMISSION OF TESTIMONY—QUESTIONS OF FACT AND OF LAW—*Industrial Commission of Colorado et al. vs. Wetz et al.*—No. 14057—*Decided March 15, 1937*—*District Court of Denver*—*Hon. Otto Bock, Judge*—*Affirmed.*

FACTS: The defendants in error, mentioned herein as claimants, filed a claim before the Industrial Commission under the Workmen's Compensation Act for death benefits. Decedent was working for the City and County of Denver in the highway department. On February 15, 1936, a cold morning, the temperature being approximately zero, the deceased attempted to start a Fordson truck, and shortly after was found dead sitting on the floor by the side of the machine with a hot shot battery between his legs. There was much carbon monoxide gas and carbon dioxide gas in the garage which had affected two other employees. The evidence is uncontradicted that decedent's death was the result of a right dilatation of the heart, but as to what caused this dilatation the examining surgeons could not ascertain. Claimant contends that her husband's death was the result of overexertion, electric shock and carbon monoxide poisoning. There is no evidence that deceased cranked the truck, or received an electric shock, but there is testimony that the usual procedure is to crank the truck before hooking up the hot shot battery. The claimants being unsuccessful before the commission, instituted an action in the District Court to review the findings and award, which court set aside the order of the commission and remanded the case with directions to enter an award in favor of claimants.

HELD: 1. The circumstances disclosed by the evidence are sufficient to prove that the deceased shortly before his death had engaged in cranking the tractor, and there is direct testimony that the motor was cold and that cranking it in such condition requires considerable exertion.

2. The claimants were not required to demonstrate the cause of the dilatation, but merely to show its cause by competent evidence, and circumstantial evidence is competent.

3. What constitutes evidence is a question of law.

4. In the light of the uncontroverted circumstances that deceased appeared to be in good health; that he was doing work that customarily involved considerable exertion; that he was breathing an atmosphere charged with a small amount of poisonous carbon monoxide and a large amount of carbon dioxide sufficient to affect noticeably two other workmen; and that either exertion or the atmospheric condition alone could

cause dilatation; and in the absence of any testimony of other medical experts as to any other probable causes of dilatation, the trial court was right in holding that as a matter of law there was uncontroverted evidence of sufficient cause of the dilatation.

5. In making findings of law from which conclusions of fact must of necessity follow, the trial court does not thereby usurp the fact-finding function of the commission.

Opinion by Mr. Justice Young. Mr. Justice Bouck and Mr. Justice Holland dissent.

FLOOD WATERS—NEGLIGENCE—INSTRUCTIONS TO JURY—ERROR—JURY — PROXIMATE CAUSE — EVIDENCE — *The Northwestern Terminal Railroad Co. et al. vs. Antonio Pilo*—No. 14115—*Decided March 22, 1937—District Court of Adams County—Hon. S. W. Johnson, Judge—Affirmed.*

FACTS: Plaintiffs in error are hereinafter referred to as the railways, and defendant in error as Pilo. Pilo brought suit against the railways for damages claimed for the flooding of his premises and destruction of his property due to the negligent construction and maintenance by them of a certain bridge. On a verdict in his favor for $1,750 judgment was entered. The railways assign three errors to the court's refusal to give three instructions which amounted to this: (1) If sufficient water overflowed below the bridge to cause Pilo the same damage, regardless of the bridge, verdict should be for the railway. (2) If a portion of the water which caused the damage overflowed below the bridge and a portion of that damage was caused by the construction and maintenance of the bridge, and the jury was unable to apportion the damage as between the two, verdict must be for the railways. (3) If a portion of the damages complained of were caused by the bridge, and a portion by overflow between the bridge, the railways could be held only for the former.

HELD: One instruction given limited liability to proximate cause, and another instruction given correctly defined proximate cause, and these were emphasized and clarified by others given; if the jurors followed said given instructions, they could not possibly have fallen into any of the errors which counsel sought to guard against by the refused instructions.

Opinion by Mr. Chief Justice Burke. Mr. Justice Hilliard and Mr. Justice Bakke concur.

CONSTITUTIONAL LAWS—SALOONS—INJUNCTION—MOOT ACTIONS—REPEAL OF AMENDMENTS BY IMPLICATIONS—REVENUE—OLD AGE PENSION AMENDMENTS—SUPREME COURT RULES—*George Golden et al. vs. State of Colorado ex rel. Baker, District Attorney*—No. 13888—*Decided March 22, 1937—District Court of Boulder County—Hon. Frederic W. Clark, Judge—Reversed.*

FACTS: Plaintiffs in error are hereinafter referred to as the town, and the defendants in error as the District Attorney. The District At-

torney brought injunction to restrain the town from issuing licenses for the retail sale of intoxicating liquor on the theory of the unconstitutionality of the statute purporting to authorize the issuance. The town's demurrer for want of facts was overruled, it elected to stand, and the writ was issued.

HELD: 1. As to the contention that this is not a case for injunction: Assuming the construction of the constitutional provision maintained by the District Attorney, and considering that it provides no penalty for its violation, he was without legal remedy and hence the suit was maintainable.

2. As to the motion to dismiss the action as moot, because newly elected officials, notwithstanding the writ, issued the licenses: In view of the statewide public interest, and inasmuch as the question can only be put at rest by judgment, the motion must be denied.

3. At the general election of 1932, Article XXII of the State Constitution was adopted, which repealed, as of the date June 30, 1933, all statutes relating to intoxicating liquors, but expressly provided that there shall be no saloons. At the general election, following, the "Old Age Pension Amendment" to the Constitution, known as Amendment No. 4, was adopted, which provided: (1) that the Old Age Pension Fund was to get 85% of "all net revenues accrued or accruing, received or receivable" from intoxicating liquor taxes "of whatever kind." (2) That no law providing revenue for the Old Age Pension Fund shall be repealed or amended unless, at the same time, substitute revenue in an equal amount be provided. Following the enactment by the General Assembly of Chapter 142, licenses were issued and "saloons," if such they be, established thereunder have since been operating generally throughout the state. Thus the revenue raising provisions of said Chapter 142 were incorporated into, and are now a part of, the Constitution, with the result that said Article XXII has been modified as to its prohibition against the establishment and maintenance of any saloon, and those places here in question which had provided, and were providing, such revenue were legalized.

4. The people, if they so desire, may write into their Constitution any provision they wish which does not conflict with the Constitution of the United States, and that power is in no way impaired by the fact that the proposed amendment was or was not theretofore statutory, or, if statutory, valid or void.

5. Since this question was not, and could not be argued by counsel, the prohibition of Supreme Court rule 48 does not apply to a petition for rehearing herein.

Opinion by Mr. Justice Holland. Mr. Justice Young and Mr. Justice Bakke dissent. Mr. Justice Hilliard delivered the dissenting opinion.

WATER RIGHTS—PRACTICE AND PROCEDURE—DECREES, CONDITIONAL—ABSOLUTE—PRIORITIES—*The Trinchera Irrigation District vs. The Trinchera Ranch Company et al.*—No. 13498—*Decided March 22, 1937—District Court of Costilla County—Hon. John I. Palmer, Judge—Reversed with Directions.*

FACTS: Proceeding for the adjudication of water rights were had in the trial court and a decree entered. It is this decree which the district now seeks to have reversed.

HELD: 1. In water adjudication matters it has not been unusual to uphold decrees without requiring strict compliance with the customary law of practice and procedure.

2. Some Colorado jurisdictions enter conditional decrees, where there is a distinction between water actually applied to beneficial use, entitling one to absolute decree, and water not yet applied in a legal sense, i. e., other rights.

3. The priorities are decreed in general and unlimited terms.

Opinion by Mr. Justice Bouck. Mr. Chief Justice Burke and Mr. Justice Young concur.

STATUTES—LEGISLATIVE AND ADMINISTRATIVE POWERS—RULE MAKING—RIGHTS—STATE EMPLOYEES PENSIONING ACT—*The State Employees' Retirement Board vs. McKelvey*—No. 14113—*Decided March 22. 1937—District Court of Denver—Hon. Frank McDonough, Sr., Judge—Affirmed.*

FACTS: Defendant in error, herein designated as petitioner, is seeking to obtain an annuity from plaintiffs in error, herein called the board, which denied petitioner's application for an annuity in September, 1936. Petitioner sued out a writ of certiorari in the District Court, and the court entered judgment remanding the cause to the board with instructions to grant the application for an annuity. The act relating to the pensioning of certain classes of state employees after retirement from office provided, among other things, that every present employee who becomes a member of the association, shall pay in, a sum, equal to all accrued deductions from his or her salary which would have been made had such employee become a member August 1, 1931, with interest thereon, etc. The association passed Rule 5 providing in effect that if any monthly payment is not made within 60 days from the due date, membership would lapse and all right shall be forfeited except the right to receive back upon demand within two years from date of last payment the accumulated deductions and direct payments standing to the credit of his or her individual account. Petitioner had come within the default provision of this rule, but had tendered the back payments plus the acquired interest, and was refused an annuity.

HELD: 1. Inasmuch as the act states that no contract right exists, then any other right, as the right to an annuity, must arise by virtue of statute, and the statute does not limit the time within which

the payments are to be made in order that statutory rights to an annuity accrue or terminate.

2. The rule-making power is limited to making rules for the administration of the fund and transaction of the business of the association and is "subject to the limitations of this act, and of the law." Therefore, rule 5 goes further than the section of the statute, under authority of which it was adapted, permits.

3. If a limitation as to when a right that has arisen under an act, passed by the General Assembly, shall cease to exist is to be imposed it must be by legislative act and not by administrative rule.

Opinion by Mr. Justice Young. Mr. Justice Holland not participating.

CONFLICT OF LAWS—CONDITIONAL SALES—COMITY—*Castle vs. Commercial Investment Trust Corp.*—No. 13804—*Decided March 22, 1937—District Court of Denver—Hon. H. E. Munson, Judge—Reversed.*

FACTS: The defendant in error brought action in replevin against the plaintiff in error to recover possession of an Auburn automobile. The parties will be herein designated as they appeared in the trial court, i. e., defendant in error as plaintiff, and plaintiff in error as defendant. From a judgment in favor of plaintiff defendant brings cause to Supreme Court by writ of error. Matlin purchased a car from the Valley Motor Sales, Inc., of Utica, New York, under a conditional sale contract recorded in New York. The motor company assigned the contract to the plaintiff. Matlin removed the car from the state of New York and it was purchased in Colorado by Kelton, Inc., and from it by the defendant herein for value in the regular course of business, and without knowledge of the foregoing contract or of its being recorded in the state of New York.

HELD: 1. The title retaining contract here involved does not give the plaintiff a right to the automobile superior to that of one who purchases it in Colorado in the regular course of business without knowledge of the existence of the contract.

Opinion by Mr. Justice Young. Mr. Chief Justice Burke and Mr. Justice Bouck concur.

WORKMEN'S COMPENSATION — SUNSTROKE — HEART TROUBLE — DIRECT CAUSE—*Wood et al. vs. Industrial Commission of Colorado et al.*—No. 14090—*Decided March 22, 1937—District Court of Denver—Hon. Robert W. Steele, Judge—Affirmed.*

FACTS: Action brought under the Workmen's Compensation Act. Deceased, a glazier, was working on a scaffold about two feet high. The coroner called was unable to find any actual cause of death, such as a fracture or a definite fall, and without holding an autopsy made a return that death was due to heart trouble, and that the contributing cause of death was heat exhaustion and heart stroke. Deceased was obese, had had heart trouble, and the day was very hot.

HELD: 1. "The mere fact of sunstroke does not constitute a death resulting therefrom an 'accident' within the statute, and harm resulting from a heat stroke is compensable only where the heat stroke is the direct and superinducing cause of the harm."

Opinion by Mr. Justice Bakke.

WARRANTIES—BURDEN OF PROOF—SALES—PUFFING—OPINION OF SELLER—UNIFORM SALES ACT—REMOTE DAMAGES—EVIDENCE—NONSUIT—*Elliott vs. Parr et al.*—No. 13976—*Decided March 22, 1937—District Court of Boulder County—Hon. Frederic W. Clark, Judge—Affirmed.*

FACTS: Plaintiff in error was plaintiff below and defendants in error were defendants below; and herein will be referred to as plaintiff and defendants. Plaintiff purchased a cream separator from defendant on trial and approval. Plaintiff approved of it and the sale was consummated. There was no clear and unequivocal testimony of a warranty that the machine was safe. After the machine had been used approximately a dozen times, and had been cleaned after each successive time, the separator bowl was violently ejected from its container, striking the plaintiff in the leg, breaking it. Action was brought October 14, 1935. After issues joined, the trial was held, at the close of which the defendants moved for a nonsuit, which was granted.

HELD: 1. There is no implied warranty of second-hand machinery.

2. Burden upon plaintiff to show an express warranty, which she failed to do.

3. Mere statements of opinion such as puffing or praise of goods by seller is no warranty.

4. The Uniform Sales Act provides that no statement purporting to be a statement of seller's opinion shall be construed as a warranty.

5. "Remote damages are such as are the result of accident or an unusual combination of circumstances which could not reasonably be anticipated, and over which the party sought to be charged had no control."

6. A nonsuit may be a judgment upon the merits and may be peremptorily ordered for a failure or insufficiency of the evidence.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.

SUPREME COURT RULE RIGHT—LIENS—RELATION BACK—MOTION—ANSWER OF COMPLAINT—STATUTES—*Chain O'Mines et al. vs. Lewison et al.*—No. 13701—*Decided March 22, 1937—District Court of Gilpin County—Hon. Samuel W. Johnson, Judge—Affirmed.*

FACTS: Action was instituted below by defendants in error to subject certain mining property of the plaintiffs in error to a lien for

work, materials and power. Judgment was for defendants in error, and no motion for new trial was filed and no order dispensing with the necessity therefor appears in either the record or bill of exceptions.

HELD: 1. Rule 8 of the Supreme Court requires that the party claiming error in the trial below must, unless otherwise ordered, move the trial court for a new trial, and, without such order, only such questions as are presented in the motion will be considered on review, and issues of fact determined by the trial court cannot be reviewed by the Supreme Court.

2. Lien statements must be filed before the expiration of one month after the time of the completion of the improvements, to protect lien rights.

3. The court having determined the definite time of the commencement of the work upon the improvement, the liens relate back to, and take effect as of that date.

4. By answering the complaint one waives any error in the denial of a motion.

5. The right to the liens provided for by Sec. 6445, C. L. 1921, is not limited, but extends the lien privileges created by Sec. 6442, C. L. 1921, to those who do work or furnish materials and services under the circumstances and for the purposes enumerated in Sec. 6445, without regard to whether or not such work is done or the materials or services furnished in the "construction, alteration, addition to or repair" of the mining property affected.

Opinion by Mr. Justice Knous, Mr. Chief Justice Burke and Mr. Justice Holland.

MALPRACTICE — NEGLIGENCE — WARRANTIES — PHYSICIANS — *Gleason vs. Ralph McKeehan*—No. 13847—*Decided March 22, 1937*—*District Court of Larimer County*—*Hon. Frederic W. Clark, Judge*—*Reversed.*

FACTS: Plaintiff in error, a physician and surgeon, against whom defendant in error obtained a judgment for $5,000.00 upon a complaint alleging malpractice, assigns error. Defendant in error alleged that a Caesarean operation was not the proper method of treatment for the relief of an alleged pending miscarriage, and that plaintiff in error knew or should have known that it was not the proper procedure; notwithstanding he advised and performed the operation and in so doing was negligent and careless. There was no evidence tending to show that defendant in error was not skillful and careful in the actual performance of the operation, that he neglected the patient in any way, or that he did not give the patient proper care, or that he went outside of the recognized field of practice.

HELD: 1. It is a rule in Colorado that: Defending physicians in malpractice cases must first have left and entirely abandoned all knowledge acquired in the fields of exploration and adopted some rash or experimental methods before they approached the danger zone of liability.

2. Before liability attached to plaintiff in error, it must have been shown that he was unskillful or negligent, and that through a lack of his skill or care the patient died.

3. A physician is not, and never can be, a warrantor of cures or even favorable results.

4. The competent physician in charge is bound only to exercise his best skill and judgment in determining the course to be followed and acting accordingly.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke, Mr. Justice Young and Mr. Justice Knous dissent.

EVIDENCE—JURY—QUESTIONS OF FACT—AGENCY—VERDICT—PASSION OR PREJUDICE—NEGLIGENCE—*Boulderado Motors vs. Ruth Peterson*—No. 13863—*Decided March 29, 1937*—*District Court of Boulder County*—*Hon. Frederic W. Clark, Judge*—*Affirmed.*

FACTS: Defendant in error, as plaintiff, filed this action to recover damages for personal injuries which she alleged she sustained as a result of an automobile collision. A jury trial resulted in a verdict in her favor and against the defendant in the sum of $10,364.00. To review this judgment, the defendant, plaintiff in error here, prosecutes this writ. The collision occurred at an intersection between the car driven by plaintiff and a car owned by the defendant and operated by Livingston. The principal question involved is the character of the relationship existing between Livingston and the defendant. Plaintiff alleges it to be that of employer and employee. Defendant, admitting ownership of the car, denied any employment at the time of the collision, and tried the case upon the theory of bailment. The evidence was conflicting as to whether the relationship was one of employer and employee, and if so, whether Livingston was acting within the scope of his employment.

HELD: 1. Questions of fact are solely within the province of the jury, and its conclusions are final if the case was submitted to it upon proper instructions which fully protected the legal rights of the defendant. Proper instructions having been submitted to the jury, its findings to the effect that Livingston was an employee of defendant, and was acting within the course and scope of his employment at the time of the accident cannot be disturbed.

2. If the amount of the verdict is so excessive as to reflect passion or prejudice or if it discloses a result other than that of fair consideration, then it should not be allowed to stand as to the amount; however, such was not the case in the present instance.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

EVIDENCE—NEGLIGENCE—RES JUDICATA—DEFENSES—DISMISSAL OF A PARTY—*Boulderado Motors vs. Roy W. Peterson and Minnie Peterson*—No. 13864—*Decided March 29, 1937*—*District Court of Boulder County*—*Hon. Frederic W. Clark, Judge*—*Affirmed.*

FACTS: This is a companion case to Boulderado Motors vs. Peterson. The present case arises out of the same collision, and was instituted by defendants in error—they being the parents of Mildred Peterson—to recover damages for her death resulting from injuries received in the automobile collision involved in both cases. In this case the driver of the car, Livingston, was joined with the defendant, now plaintiff in error, as a party defendant. Owing to the infancy of Livingston, complications arose concerning service upon him and his failure to appear, and plaintiff's counsel asked and obtained leave of court to strike his name as defendant. Trial then proceeded against the remaining defendant without objection, resulting in a judgment against it in the sum of $3,500.00. No consideration had been received by plaintiffs, from Livingston for his release; it was a voluntary dismissal without consideration. For the first time defendant here interposes the defense of res judicata or release, due to the dismissal of Livingston from the case, and also that Livingston was an independent contractor.

HELD: 1. Res judicata is a defense that must always be pleaded affirmatively. If defendant seriously considered the dismissal of Livingston as providing a defense of res judicata, he should then and there have interposed such defense. By proceeding further he waived the benefit, if any, he could claim by reason of this defense.

2. As to the defense based on the theory that Livingston was an independent contractor, which was sought to be interposed for the first time, the same rule applies, i. e., the court refuses to consider any question so belatedly presented.

Opinion by Mr. Justice Holland. Mr. Chief Justice Burke and Mr. Justice Knous concur.

INSURANCE—REASONABLENESS OF INTERVENING TIME BETWEEN INJURY AND HOSPITALIZATION—*The Continental Casualty Co. vs. Youngblood*—No. 14106—*Decided March 29, 1937*—*County Court of Denver*—*Hon. George A. Luxford, Judge*—*Affirmed.*

HELD: When the provision for hospital indemnity found in an accident insurance policy contains no restrictions as to time, nine months intervening between the time of the injury and the hospitalization and convalescence was not unreasonable so as to preclude the injured from recovery under the policy.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Burke and Mr. Justice Hilliard concur.